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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

C&M INVESTMENT GROUP LTD., et al., Plaintiffs and Respondents, v. MLG AUTOMOTIVE LAW, A Professional Law Corporation et al., Defendants and Appellants.	B285306 (Los Angeles County Super. Ct. No. BC624771)

APPEAL from an order of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

MLG Automotive Law, Johnathan A. Michaels, and Daniel Uribe for Defendant and Appellant MLG Automotive Law, PLC.

Law Offices of Tarik S. Adlai and Tarik S. Adlai for Defendant and Appellant Walter Urban.

Kirkland & Ellis, Luke L. Dauchot, and Lauren J. Schweitzer for Plaintiffs and Respondents C&M Investment Group Ltd. and Karlin Holdings Limited Partnership.

Defendants MLG Automotive Law, PLC (MLG), a law firm, and Keith Urban (Urban), an attorney, appeal the trial court's denial of their Code of Civil Procedure section 425.16[1] special motion to strike a complaint filed against them by C&M Investment Group Ltd. and Karlin Holdings Limited Partnership (collectively, plaintiffs). Plaintiffs' complaint alleges that MLG and Urban accepted payment from two former clients, Richard Powers and Neil Campbell, for defending Campbell and Powers in criminal proceedings. It further alleges that, at the time of this payment, MLG and Urban knew that plaintiffs had secured multi-million dollar judgments against Campbell and Powers to retrieve millions of dollars that Campbell and Powers had fraudulently obtained from plaintiffs, and that, as a result, all funds from which Powers and Campbell might pay legal fees were subject to judgment liens in plaintiffs' favor. On this basis, plaintiffs' complaint asserts conversion, receiving stolen property, and unfair business practices causes of action against MLG and Urban.

On appeal, MLG and Urban argue the trial court erred in denying their motions to strike plaintiffs' complaint under section 425.16, California's "anti-SLAPP"[2] statute. They identify two activities alleged in the complaint that they contend are protected under the statute: (1) MLG and Urban's receipt of legal fees as "litigation funding," and (2) MLG and Urban's representation of Powers and Campbell. As to the first argument, we conclude that MLG and Urban's receipt of legal fees in a

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[1] Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

[2] SLAPP is an acronym referring to "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

criminal case is not protected "litigation funding" activity under the anti-SLAPP statute. As to the second, although MLG and Urban's representation of their clients in litigation constitutes protected activity, plaintiffs' claims do not "arise from" such representation, because it is not necessary to support any element of those claims. Thus, MLG and Urban have not made the requisite showing for striking a complaint under the anti-SLAPP statute.

Because they have failed to make such a showing, we also find unpersuasive MLG and Urban's policy arguments that permitting plaintiffs' claims to survive an anti-SLAPP motion would lead to the very evils the statute seeks to prevent or would otherwise negatively affect a defendant's ability to secure counsel of her choosing. Assuming that the evils they predict will arise from our decision, it would be up to the Legislature, not us, to change the law. In any case, we disagree that our decision will have the far-reaching chilling effect or Sixth Amendment implications MLG and Urban envision.

We therefore affirm.[3]

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Karlin Holdings Limited Partnership (Karlin) is the sole shareholder of plaintiff C&M Investment Group, Ltd. (C&M). Karlin is owned almost entirely by Gary Michelson, who is not a party to this action. C&M was formed in connection with a business venture between Michelson and two individuals who are likewise not parties to this action, Richard Powers and Neil Campbell. The goal of the venture was to invest in teak wood farms

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[3] Because we conclude plaintiffs' claims do not arise from protected conduct, we need not reach the additional arguments, not outlined here, that MLG and Urban raise on appeal.

in Costa Rica. In connection with this venture, Michelson wired money to Powers in Costa Rica to invest in properties on behalf of C&M, as well as additional amounts Powers told Michelson were necessary to operate the farms. In making investment decisions regarding the properties Powers proposed, Michelson relied in part on advice from Campbell, who regularly visited Costa Rica for the purpose of inspecting prospective investment properties, and who vouched for Powers's investment suggestions. This joint venture continued for approximately six years, during which time Michelson wired Powers approximately $32 million dollars for the purchase and operation of teak farm property on C&M's behalf.

A. *Related Civil Judgments Against Powers and Campbell*

Plaintiffs sued Powers and Campbell, alleging that the Costa Rican investment effort was part of an elaborate scheme by the two men to defraud Michelson. Specifically, plaintiffs allege that Powers and Campbell convinced Michelson that C&M should acquire several teak properties in Costa Rica, communicated falsely inflated purchase prices to Michelson, and shared the resulting excess amount collected from Michelson. Plaintiffs asserted causes of action for fraud, fraudulent inducement, civil RICO violations, and other claims.

Plaintiffs successfully moved for summary judgment on all claims against Campbell, and the court entered judgment against Campbell in the amount of $24 million, reflecting $8 million in stolen funds, trebled under the civil RICO statute. The court also entered a judgment of default against Powers as part of terminating sanctions for discovery abuses. The court then awarded damages under the default judgment in the amount of $36,680,676.46, reflecting the court's finding of $12 million in actual damages, trebled under the civil RICO statute.

Plaintiffs have not been able to meaningfully collect on these judgments, as Powers and Campbell claimed to have no assets. In the course of efforts to collect on these judgments, plaintiffs served debtor's examination notices on Powers and Campbell, which resulted in postjudgment liens on both men's assets.

B. *MLG and Urban's Representations of Campbell and Powers in Related Criminal Proceedings*

The Los Angeles County District Attorney's Office prosecuted Campbell and Powers for felony grand theft based on the same conduct alleged in plaintiffs' civil suit. Campbell hired MLG to defend him against these criminal charges. Powers initially hired Urban as his criminal defense counsel, but later substituted in MLG.[4]

A jury ultimately found both Campbell and Powers guilty of one count of grand theft of personal property in an amount exceeding $400. The jury found them not guilty of the four remaining counts presented at trial, in one instance based on the expiration of the statute of limitations. The court concluded it had insufficient information to calculate what, if any, restitution should be awarded to Michelson based on these convictions.

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[4] For the sake of brevity, we refer to MLG's representation of Campbell, MLG's representation of Powers, and Urban's representation of Powers collectively as "MLG and Urban's representation of Campbell and Powers."

C. *Complaint Against MLG and Urban*

Plaintiffs sought to recover some of the money owed them under the civil judgments against Campbell and Powers via a complaint against MLG and Urban asserting conversion, receipt of stolen property, and unfair business practices under California Business and Professions Code section 17200 (UCL). The complaint alleges Powers and Campbell used money they stole from plaintiffs via the Costa Rican investment scheme to pay Urban and/or MLG for legal services. The complaint further alleges that, in the context of their representation of Campbell and Powers, MLG and Urban learned of the plaintiffs' postjudgment lien against any funds Powers and Campbell might use to pay Urban and/or MLG's attorney fees,[5] and that "at the time [Urban and MLG] accepted [the funds from Campbell and Powers] and applied them to cover attorneys' fees, [Urban and MLG] were aware that the funds were the proceeds of fraud and had been wrongfully obtained from [plaintiffs]."

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[5] Specifically, plaintiffs allege that they had "notified [Urban] that all of Powers'[s] assets that might be used to pay [Urban's] attorneys' fees were subject to post-judgment lien in favor of [p]laintiffs," and had similarly advised MLG's co-counsel regarding the possible source of attorney fees from Campbell. The complaint further alleged, on information and belief, that as a result of MLG's involvement in the criminal proceedings, the firm was aware of "the debtor's examination proceedings against Powers and the resulting post-judgment lien."

D. *Anti-SLAPP Motion to Strike Plaintiffs' Complaint Against MLG and Urban*

Both Urban and MLG moved to strike plaintiffs' complaint under section 425.16. Section 425.16 is designed to "weed[] out, at an early stage, meritless claims arising from protected activity," meaning activity " 'in furtherance of the person's right of petition or free speech.' " (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 381, 384 (*Baral*), italics omitted; § 425.16, subd. (b)(1).) The statute provides a mechanism for striking claims (or portions thereof) that arise from such protected activity, "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Ibid.*; see *Baral, supra*, 1 Cal.5th at p. 393.)

Both MLG and Urban's motions argued that plaintiffs' claims arose from "litigation funding," which constitutes protected activity under the anti-SLAPP statute, and that such activity was not merely incidental to plaintiffs' claims. (See *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*).) MLG further argued that failure to apply the anti-SLAPP statute to plaintiffs' complaint would "chill a litigant's right to have the counsel of [its] choosing." (Boldface omitted.) In connection with this argument, Jonathan Michaels, an attorney at MLG, filed a supplemental declaration, in which he declares that, while the anti-SLAPP motions were pending, Powers sought additional legal assistance from MLG, but Michaels declined, for fear that this might create additional liability for his firm. Based on similar concerns, Michaels refused to refer Powers to any of Michaels's colleagues.

The trial court conducted two hearings on the motions and requested supplemental briefing regarding "whether the conduct at issue is protected activity (first prong) [under section 425.16]."

The court ultimately denied the motions on the basis that the claims in the complaint did not arise from protected conduct.

Both Urban and MLG filed timely notices of appeal. MLG and Urban's appeals raise largely the same arguments, and we therefore address them together in our discussion below.

DISCUSSION

In analyzing an anti-SLAPP motion, a court first determines whether the complaint alleges protected free speech or petitioning activity, and then determines whether the claims the movant seeks to strike "aris[e] from" such protected activity. (*Baral, supra*, 1 Cal.5th at p. 396; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) If so, the burden shifts to the plaintiff to establish that any such claims based on protected activity are legally sufficient in "a summary-judgment-like procedure." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278, 291; *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) Claims and allegations as to which the plaintiff fails to make such a showing should be stricken. (*Baral, supra*, 1 Cal.5th at p. 396.)

On appeal, we review the trial court's decision regarding an anti-SLAPP motion de novo, "engaging in the same two-step process." (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266–267 (*Tuszynska*).) In so doing, we consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

We must first determine whether any of "defendant's act[s] underlying the plaintiff's cause[s] of action" constitutes protected activity. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).) Protected activity under the anti-SLAPP statute includes "any act" that is "in furtherance of" a defendant's free speech or petitioning rights, including "any written or oral

statement or writing made before a . . . judicial proceeding." (§ 425.16, subd. (e); see *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 422.) " 'Any act' includes communicative conduct such as the filing, *funding*, and prosecution of a civil action." (*Rusheen, supra,* 37 Cal.4th at p. 1056, italics added, citing *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 17–19 (*Ludwig*).)

As noted, MLG and Urban identify two activities alleged in the complaint that they argue are protected: MLG and Urban's receipt of legal fees and MLG and Urban's representation of Powers and Campbell. We address each in turn below.

I. MLG and Urban's Receipt of Legal Fees

MLG and Urban first argue that their receipt of legal fees for representation of a criminal defendant constitutes protected litigation funding activity. (See *Rusheen, supra,* 37 Cal.4th at p. 1056; *Ludwig, supra,* 37 Cal.App.4th at pp. 17–19.)

MLG and Urban cite several decisions concluding that payment of attorney fees to pursue or defend against civil litigation may constitute protected conduct. (See, e.g., *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1166 (*Sheley*) [involving allegations defendant breached its fiduciary duties in part by filing frivolous litigation and "wrongfully depleting and wasting corporate assets to fund . . . litigation against [defendant]"], italics omitted; *Tuszynska, supra,* 199 Cal.App.4th at p. 268, quoting § 425.16, subd. (e)(2) [concluding defendants' decisions regarding whether to fund certain litigation, and which attorneys to hire, "constitute statements or writings 'made in connection with an issue under consideration or review by a legislative, executive, or judicial body.' "].) But the reasoning animating these civil cases does not apply to an attorney's receipt of legal fees for representing a client

in *criminal* proceedings.[6] This stems from the disparate roles private counsel plays in civil versus criminal litigation. There is no constitutional right to an attorney in civil cases, meaning the only way a civil litigant can petition the court through an attorney is by successfully retaining private counsel. Thus, in civil cases, a litigant's ability to retain a private attorney affects the fundamental nature of her petitioning conduct before the court; that is, whether the litigant can petition with the assistance of counsel or not. Because retaining a private attorney has such potential to change the scope of a civil litigant's petitioning conduct, actions necessary to retain counsel—payment and receipt of civil litigation funding—are "in furtherance" of petitioning conduct and protected under the anti-SLAPP statute.

In the criminal context, however, securing private representation has *no* effect on whether a defendant can petition the court through counsel, because the court will appoint an

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[6] MLG and Urban cite one federal case addressing whether an attorney's receipt of fees constitutes protected conduct under the anti-SLAPP statute. (See *Flores v. Emerich & Fike* (E.D.Cal. 2006) 416 F.Supp. 885, 908 (*Flores*).) *Flores* concludes that it is, but offers no reasoning or discussion as to why this should be so, either on the facts of that case or more generally. Indeed, the section of the opinion entitled "Applicability of the Anti–SLAPP Statute" provides in its entirety: "The alleged acts are all related to the Fike [d]efendants' right to petition the courts to represent clients as attorneys and are therefore covered by the Anti–SLAPP statute." (*Flores, supra*, 416 F.Supp. at p. 908.) But conduct underlying a claim must be more than merely related to protected activity in order for the anti-SLAPP statute to apply. (See *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537–1538 (*Kolar*); see also Discussion part A.1 *post*, at pp. 13-15.) Thus, *Flores* is not only nonbinding, it is not persuasive.

attorney to represent a criminal defendant if the defendant is financially unable to retain one. Thus, unlike in the civil context, a criminal defendant's ability to retain a private attorney—including payment and receipt of legal fees—cannot change the scope of the petitioning conduct in which the defendant can engage; that is, whether he can petition with the assistance of counsel or not. Thus, unlike in the civil context, actions associated with the retention of private counsel in a criminal case—such as the payment and receipt of litigation funding—are not in furtherance of petitioning conduct.

MLG and Urban argue that an attorney's receipt of legal fees should be no less protected than a litigant's payment of those fees. But both *are* protected to the same extent: That is, to the extent that, under the specific facts of a particular case, either reflects conduct "in furtherance of" petitioning activity. That the receipt of legal fees under the circumstances alleged here does not meet this standard, but payment of legal fees under *different* circumstances in civil litigation might, is not an unfair or imbalanced result.

MLG and Urban attempt to argue to the contrary by citing the principle that "qualifying [protected] acts committed by attorneys in representing clients in litigation" do not lose protected status merely because the attorney, as opposed to the litigant client, was the actor. (*Rusheen, supra*, 37 Cal.4th at p. 1056; see, e.g., *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 478 ["[a]n attorney has standing to bring a special motion to strike a cause of action arising from petitioning activity undertaken on behalf of the attorney's client"].) We do not dispute the general principle that "all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding . . . are per se protected as petitioning activity by the anti-SLAPP statute." (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479–480 (*Cabral*).) But that principle is inapplicable here. An attorney

is not acting on his client's behalf when he accepts payment for his services, nor is accepting payment otherwise "qualifying act[]s." (*Ibid.*; *Rusheen, supra*, 37 Cal.4th at p. 1056; cf. *Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 210 (*Finton*) [claim for conversion based on attorney's refusal to return allegedly stolen hard drive was protected conduct, because attorney was acting on client's instruction in the course of litigation in doing so].)

MLG and Urban's alleged receipt of litigation funding in criminal proceedings is thus not an act "in furtherance of" petitioning conduct on this or any other basis, and is not protected activity under section 425.16.

II. MLG and Urban's Representation of Campbell and Powers

MLG and Urban also suggest that plaintiffs' claims arise not only from litigation funding, but more broadly from MLG and Urban's representation of Campbell and Powers in the criminal proceedings. Such representation is an act in furtherance of Campbell's and Powers's rights to petition the courts, and thus constitutes protected activity. (See *Bleavins v. Demarest* (2001) 196 Cal.App.4th 1533, 1542 ["claim against [a law] firm arising from either its retention by an insurer or its approach to litigation would necessarily be based on counsel's [protected conduct]"], italics omitted.) We must therefore consider whether plaintiffs' claims "arise from" MLG and Urban's representation of Campbell and Powers in the criminal proceedings.

A. *Element-Based Analysis*

A claim "aris[es] from" protected activity alleged in a complaint if that activity " 'gives rise to [the] asserted liability,' " (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063 (*Park*)) and thus "is alleged to justify a remedy." (*Baral, supra*, 1 Cal.5th at p. 395.) To determine whether this is the case, "courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Park, supra*, 2 Cal.5th at p. 1063.)

Here, MLG and Urban's representation of Powers and Campbell is the purpose for and context in which MLG and Urban accepted the funds at issue. But "[a] cause of action may be 'triggered by' or associated with a protected act, [and] it does not necessarily mean the cause of action arises from that act." (*Kolar, supra,* 145 Cal.App.4th at pp. 1537–1538, italics omitted, quoting *City of Cotati, supra,* 29 Cal.4th at pp. 77–78; see *Gaynor v. Bulen* (2018) 19 Cal.App.5th 864, 879 (*Gaynor*) [in complaint against trustees "alleg[ing] wrongful plan to alter the trustee succession rules to favor their own interests," "allegation that [funds] were improperly used on the probate litigation . . . merely reflected the manner in which the [defendants] implemented their" plan].) Applying *Park*'s element-based analysis to plaintiffs' claims reveals that while they are *associated* with MLG and Urban's representation, they do not rely on that representation to establish the alleged injury-causing conduct.

Plaintiffs assert claims for conversion, receiving stolen property, and unfair business practices. The elements of a conversion claim are: (1) plaintiff's ownership or right to possession of the property; (2) the defendant's conversion thereof,

which is defined as "the wrongful exercise of dominion over the property of another"; and (3) damages. (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.) "Conversion is a strict liability tort." (*Ibid.*) Thus, plaintiffs need not allege under what circumstances or for what purpose they claim MLG and Urban exercised dominion over plaintiffs' property in order to support any of these elements; "the act of conversion itself is tortious." (*Ibid.*)

Nor are the circumstances under which MLG and Urban accepted the money an element of a civil claim for receiving stolen property under Penal Code section 496, subdivision (c). Such a claim requires: (1) receiving property "stolen or that has been obtained in any manner constituting theft or extortion," including theft by false pretenses, and (2) knowledge that the property was so obtained or stolen. (Pen. Code, § 496, subd. (a); see *id.*, subd. (c); *Bell v. Feibush* (2013) 212 Cal.App.4th 1041, 1047–1048 [Penal Code section 496, subdivision (a) covers property obtained by false pretenses].) Although MLG and Urban's attorney-client relationship with Powers and Campbell may have provided the context in which MLG and Urban are alleged to have learned the money's origin, this does not make *the fact of* that relationship necessary to prove the knowledge element of a Penal Code section 496 claim. (See *Gaynor, supra*, 19 Cal.App.5th at p. 882 [that funds were "used for various alleged improper purposes, including to fund the probate litigation, provides evidence to support the claim for breach of [statutory duty by trustees], but is not an essential element of the claim"].)

Finally, the fact that MLG and Urban represented Campbell and Powers does not assist plaintiffs in proving that MLG and Urban engaged in the alleged unfair or illegal business practices on which plaintiffs base their UCL claim.

Indeed, were one to delete from the complaint all references to MLG and Urban's representation of Campbell and Powers, all elements of plaintiffs' conversion, receiving stolen property, and UCL claims would remain satisfied. Plaintiffs' alleged injury and damages likewise would remain the same, were one to ignore references to legal representation. Specifically, MLG and Urban allegedly injured plaintiffs by accepting $475,000 plaintiffs might otherwise have been able to collect from Campbell and Powers to satisfy plaintiffs' judgments. Such injury is measured by the amount accepted, and would remain the same, regardless of what services MLG and Urban performed in exchange. In this sense as well, the defendants' representation of Powers and Campbell does not help "justify a remedy." (*Baral*, *supra*, 1 Cal.5th at p. 395.)

Thus, neither the "specific elements of the . . . plaintiffs' claims" nor the general injury alleged "depend[] upon the . . . protected activity"; rather, plaintiffs' complaint could "demonstrate the existence of a . . . controversy between the parties supporting a claim" even "without the [protected conduct]." (*Park, supra*, 2 Cal.5th at p. 1064.) Put differently, MLG and Urban's representation of Powers and Campbell is not an "activit[y] that form[s] the basis for a claim" but rather an activity "*that merely lead[s] to the liability-creating activity*." (*Ibid.*, italics added.) The California Supreme Court has admonished that we should be "attuned to and . . . respect the distinction between" these two types of activities in analyzing the first prong of an anti-SLAPP analysis. (*Ibid.*)

B. *MLG and Urban's But-For Causation Arguments*

MLG and Urban suggest that their representation of Campbell and Powers is not just context for plaintiffs' claims, because MLG and Urban never would have had occasion to accept

the money at issue, but for that representation. MLG cites *Park*'s comparative analysis of *Navellier, supra*, 29 Cal.4th 82 and *City of Cotati, supra,* 29 Cal.4th 69, two cases that considered whether the claims at issue "arise from" the defendants' alleged prior filing of a separate lawsuit. *Park* concluded that, in *Navallier*, unlike in *City of Cotati*, "the prior claims were an essential part of the activity allegedly giving rise to liability," because the *Navellier* plaintiffs alleged defendants had breached a release contract and committed fraud "*by filing counterclaims in a pending action* in contravention of the release's terms." (*Park*, *supra*, 2 Cal.5th at p. 1063.) Thus, the *Navallier* defendant was " 'being sued because of the affirmative counterclaims he filed in federal court' " and " '*but for* the federal lawsuit and [the defendant's] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis.' " (*Ibid.*, italics added, citing *Navellier, supra*, 29 Cal.4th at p. 90.) Not so here. Here, plaintiffs are not suing MLG and Urban because they represented Campbell and Powers, but rather because MLG and Urban allegedly accepted funds they knew belonged to plaintiffs.

MLG and Urban similarly rely on a "but for" causal relationship with protected conduct referenced in *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 114-115 (*Optional Capital II*) to suggest their claims arise from protected conduct. The plaintiff in *Optional Capital II* was an investment company, Optional Capital, the alleged looting of which by DAS Corporation (DAS) and a group of individuals and entities (the Kims) led to several legal proceedings. In one of these proceedings in federal court, Optional Capital sued the Kims. In a separate state court proceeding, DAS—represented by the defendants—also sued the Kims. DAS's attorneys ultimately negotiated a settlement

on DAS's behalf in the state lawsuit, pursuant to which the Kims transferred $13 million to DAS. Optional Capital also obtained a judgment against the Kims in the federal action, but was unable to collect. In the suit that was the subject of the anti-SLAPP motion in *Optional Capital II*, Optional Capital sued DAS's attorneys, alleging a conspiracy to prevent Optional Capital from collecting on its federal judgment. DAS's attorneys were alleged to have participated in this conspiracy by, inter alia, negotiating the settlement with the Kims on DAS's behalf. DAS's attorneys argued that the claims against them were premised on their provision of legal services to DAS in the state court action, and should be stricken under section 425.16.

This court agreed, relying on authority involving conduct that, like the defendants' negotiation of the Kim settlement, reflected " ' "communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding." ' " (*Optional Capital II*, *supra*, 18 Cal.App.5th at p. 113, quoting *Finton, supra*, 238 Cal.App.4th at p. 210.) Because the Kims would not have transferred the $13 million to DAS, "*but for* [the defendant attorneys'] work in negotiating a settlement of the state court action and *but for* [their] alleged failure to timely disclose the settlement to the federal district court," this court concluded that "the gravamen of [Optional Capital's] claims against [DAS's attorneys] [was] based on protected activity." (*Optional Capital II*, *supra*, 18 Cal.App.5th at pp. 114-115, italics added.)

Thus, the "but for" causal connection in *Optional Capital II* was between the plaintiff's claims and the *negotiation of a settlement*, an effort *undertaken by attorneys on behalf of their clients in litigation*. By contrast, plaintiffs' complaint alleges neither that the representation involved an act akin to settlement negotiations, nor any actions MLG or Urban undertook on a client's

behalf in the course of litigation. *Optional Capital II* is thus of no help to MLG and Urban's arguments that plaintiffs' claims arise from protected litigation conduct.

Case law analyzing anti-SLAPP motions to strike claims based on an attorney taking on new representation is instructive by analogy. (See, e.g., *Benasra v. Mitchell Silberberg, & Knupp LLP* (2004) 123 Cal.App.4th 1179 (*Benasra*) [involving attorney's alleged breach of duty of loyalty by accepting as a client the arbitration adversary of a former client]; *Freeman v. Schack* (2007) 154 Cal.App.4th 719 (*Freeman*) [breach of contract claim alleging plaintiff's attorney took on representation of client adverse to plaintiff's interests].) We view such cases as analogous to the issue before us in two key respects. First, such claims are based solely on an attorney's acceptance of a new client, just as plaintiffs' claims here are based solely on an attorney's acceptance of funds from a new client. And acceptance of a new client—also like an attorney's acceptance of legal fees—is a precursor to protected litigation activity: After the attorney accepts either, she acts on behalf of the new client in litigation, and but for her acceptance of the representation, she would not do so.

Yet claims based on an attorney accepting a new client do not "arise from" any protected litigation activity that occurred as a result. This is because, in the moment the attorney takes on the new representation, the attorney either commits the breach alleged or she does not; what happens in the course of the new representation will not affect which is the case. (See *Benasra, supra*, 123 Cal.App.4th at p. 1189 ["[O]nce the attorney accepts a representation in which confidences disclosed by a former client may benefit the new client due to the relationship between the new matter and the old, he or she has breached a duty of loyalty. The breach of fiduciary duty lawsuit may follow litigation pursued

against the former client, but does not arise from it."].) In *Freeman*, for example, plaintiffs alleged their attorney took on representation of another client that was adverse to plaintiffs' interests, and that he filed litigation likewise adverse to the plaintiffs' interests. (*Freeman, supra*, 154 Cal.App.4th at p. 729.) The court concluded that plaintiffs' breach of contract, breach of fiduciary duty, and negligence claims against the attorney did not arise from protected activity under the anti-SLAPP statute because "the 'activity that gives rise to [the attorney's] asserted liability' " was "his undertaking to represent a party with interests adverse to plaintiffs, in violation of the duty of loyalty" and that "plaintiffs' allegations concerning [the attorney's] filing and settlement of the [allegedly adverse] litigation [we]re incidental" thereto. (*Id.* at p. 732, quoting *Navallier, supra*, 29 Cal.4th at p. 92.) So, too, with plaintiffs' claims here: The receipt of the money to fund MLG and Urban's representation of Campbell and Powers was either conversion of plaintiffs' stolen property or it was not, regardless of what happened in the course of the representation funded thereby.

III. MLG and Urban's Reliance on *Rusheen*

Both MLG and Urban rely heavily on *Rusheen*. Although it is somewhat unclear, they appear to do so in arguing both that receipt of litigation funding constitutes protected activity, and that plaintiffs' claims more broadly arise from protected litigation activity. But *Rusheen* does not support the application of the anti-SLAPP statute to plaintiffs' claims in either respect.

MLG incorrectly describes *Rusheen* as "[holding] that litigation funding is communicative petitioning conduct because, without funding, clients could not participate in the judicial process." First, *Rusheen* addressed the scope of the litigation privilege, not the related but separate issue of the scope of

protected conduct under the anti-SLAPP statute.[7] (*Rusheen, supra,* 37 Cal.4th at p. 1055.) Second and more fundamentally, *Rusheen*'s holding is much narrower than MLG and Urban describe it. Namely, the Court "conclude[d] that *where the cause of action is based on a communicative act*, the litigation privilege *extends to those noncommunicative actions which are necessarily related to that communicative act*." (*Id.* at p. 1052, italics added.) In other words, a party seeking to apply the anti-SLAPP statute to noncommunicative conduct must prove that such conduct is "necessarily related to [a] communicative act" on which "the cause of action is based." (*Ibid.*) In *Rusheen*, for example, defendants sought to strike an abuse of process claim, which was "based on the communicative act of filing allegedly false declarations of service to obtain a default judgment." The court concluded that "postjudgment enforcement efforts" such as the "act of levying on property" were necessarily involved in such communicative conduct, were "protected by the litigation privilege[,]" and claims based thereon should be stricken under section 425.16. (*Ibid.*) Thus, *Rusheen* reflects the application of well-recognized prong one principles described above—not an exception to them—and does

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[7] Specifically, the California Supreme Court "granted [the] petition for review to determine: (1) whether actions taken to collect a judgment, such as obtaining a writ of execution and levying on the judgment debtor's property, are protected by the litigation privilege as communications in the course of a judicial proceeding; and (2) whether a claim for abuse of process based on the filing of an allegedly false declaration of service is barred by the litigation privilege on the ground the claim is necessarily founded on a communicative act." (*Rusheen, supra,* 37 Cal.4th at p. 1055.)

not relieve the anti-SLAPP movant of its burden of establishing the injury alleged arises from protected communicative activity.[8]

It follows that *Rusheen* does not demand a different outcome for MLG and Urban's anti-SLAPP motion than we reach above. Applying the logic of *Rusheen* to the case at bar, *if* plaintiffs' claims relied on some protected conduct, and *if* MLG and Urban's receipt of funds were necessary to achieve that protected conduct, such a receipt of funds might be protected conduct as well. But neither is the case. Rather, MLG and Urban argue that such funding is necessary *to Campbell's and Powers's defense in the criminal case*, which constitutes protected communicative conduct. Even if this is true, it is not sufficient for the logic of *Rusheen* to apply, because Campbell's and Powers's defense of the criminal case is in no way alleged to be the basis for any of plaintiffs' causes of action.

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[8] Indeed, in *Rusheen*'s assessment of the applicability of the litigation privilege, the Court refers to the "gravamen" of the claim at issue, a concept courts previously used to assess whether a claim "arises under" protected activity. (See *Rusheen*, *supra*, 37 Cal.4th at p. 1062 ["Thus, where the gravamen of the complaint is a privileged communication . . . the privilege extends to necessarily related noncommunicative acts (i.e., act of levying)."].)

IV. MLG and Urban's Policy Arguments Are Not a Replacement for Satisfying Statutory Requirements

MLG and Urban argue that the anti-SLAPP statute should be construed broadly, and that a failure to do so here will encourage the very evils the statute seeks to prevent. For example, they argue that plaintiffs' claims have burdened Powers's petitioning conduct, to the extent that it has chilled his ability to obtain counsel of his choosing. MLG and Urban also foresee that attorneys' fears of being sued will have a broader chilling effect on litigants' ability to obtain desired counsel, as well as on attorneys' ability to zealously represent their clients, thereby impinging on litigants' Sixth Amendment rights. Urban further notes that the core purpose of the anti-SLAPP statute is to prevent frivolous lawsuits filed as weapons to chill speech or petitioning conduct, and argues that plaintiffs' complaint presents just such a suit.

Because MLG and Urban have failed to make the showing section 425.16 requires, we need not delve into whether, or to what extent, applying the statute to their claims would serve its underlying purpose. "While we are required to construe the statute broadly, we must also adhere to its express words." (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 864 [concluding lawyer's investigation of party to arbitration in connection with arbitration not a communicative act or protected conduct under the statute].) We thus need not and do not address whether MLG and Urban's arguments accurately portray the policy goals of section 425.16, or whether the application of the statute to plaintiffs' claims would serve those policy goals.

We note, however, that declining to apply the anti-SLAPP statute to plaintiffs' claims does not affect a litigant's constitutional right to counsel, because a defendant already "has no Sixth Amendment right to spend another person's money for services

rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice." (*Caplin & Drysdale, Chartered v. United States* (1989) 491 U.S. 617, 626.) Just so here: Plaintiffs' theory of liability is not that MLG and Urban simply accepted legal fees, but rather that they accepted legal fees *they knew to effectively belong to someone else*. And, as discussed above, even if a chilling effect were to result from our decision and render a criminal defendant unable to secure private counsel, under no circumstances would a criminal defendant be forced to defend himself without the benefit of counsel. Rather, he would have the benefit of a court-appointed attorney, as well as both state and federal constitutional safeguards assuring his attorney provides him effective and meaningful counsel.

DISPOSITION

The trial court's order denying defendants' section 425.16 special motion to strike plaintiffs' complaint is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

WEINGART, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.